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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 MARSH & MCLENNAN AGENCY LLC,

4 Plaintiff,

5 v.

19 Civ. 3837 (VSB)

6 RICK FERGUSON,

7 Defendant.

8 -----x
9 New York, N.Y.
May 2, 2019
10 9:00 a.m.

11 Before:

12 HON. VERNON S. BRODERICK,

13 District Judge

14 APPEARANCES

15 LITTLER MENDELSON. P.C.
Attorneys for Plaintiff
16 BY: A. MICHAEL WEBER
DANIELLA ADLER

17 OUTTEN & GOLDEN LLP
Attorneys for Defendant
18 BY: NICHOLAS H. SIKON

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(Case called)

THE COURT: Counsel, please note their appearances for the record.

We're here on Marsh McLennan v. Ferguson

MR. WEBER: Michael Weber and Daniella Adler, Littler Mendelson, for the plaintiff.

MR. SIKON: Good morning. Nicholas Sikon for the defendant, Rick Ferguson.

THE COURT: Mr. Sikon, I don't know, have you had an opportunity to file an appearance?

MR. SIKON: I was retained last night at around 8:00 in the evening, so I haven't had a chance to do that.

THE COURT: I figured as much. I looked at the docket after that to see whether anybody filed a notice of appearance.

I take it you've been in contact with the attorney who is mentioned in the -- who Ms. Dupri, Mr. Dupri?

MR. SIKON: Yes, your Honor. I spoke briefly with Ms. Dupri and Mr. Ferguson last night.

THE COURT: All right. You may be seated.

I have all the papers. Have the parties had an opportunity to discuss where things stand and what the next step is?

Let me hear from plaintiff and then I'll hear from defendant.

MR. WEBER: Thank you, your Honor.

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1 I just met Mr. Sikon this morning. I'm sure we'll
2 have an opportunity to work together and organize a discovery
3 schedule.

4 As you know, we're here on an application for a TRO
5 and expedited discovery.

6 THE COURT: Yes.

7 MR. WEBER: The facts as we have them before your
8 Honor are quite stark. We have an individual who worked for
9 our client for a long time, signed not one by two agreements.
10 This is not a non-compete case. He can work wherever he wants.
11 He can't solicit our clients. He did it both before he
12 resigned and after.

13 There is a number of declarations and affidavits
14 before your Honor with exhibits that show that he has clearly
15 violated his obligations. We are seeking this extraordinary
16 relief because he has blatantly violated those obligations. We
17 also ask for expedited discovery. We are prepared to take
18 depositions within the next week and to move this case along.

19 Again, I have not had an opportunity --

20 THE COURT: Sure. Well, let me see.

21 Mr. Sikon, am I pronouncing that correctly?

22 MR. SIKON: Yes, you are, your Honor.

23 THE COURT: Are you sure?

24 MR. SIKON: Yes.

25 THE COURT: All right. Now, Mr. Sikon, I guess the

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1 question I have is, well, what is your position?

2 In other words, what is your position?

3 MR. SIKON: Your Honor, a few things.

4 First of all, I am obviously still getting up to speed
5 on the matter.

6 THE COURT: Yes.

7 MR. SIKON: A few things I wanted to note to your
8 Honor this morning.

9 First, I think it is fairly evident from their own
10 submission there is no real emergency here and there is no need
11 for a TRO. It is clear from --

12 THE COURT: Would you agree, will your client agree he
13 will stop contacting clients that he used to service at Marsh
14 McLennan?

15 MR. SIKON: I actually think that goes to a second
16 point. If you look at the actual language of the agreements at
17 issue, I don't actually think he is barred from soliciting
18 those clients. He is barred from using confidential
19 information or trade secrets to solicit clients. He is not
20 actually barred from soliciting those clients.

21 As another issue, your Honor, I think they are
22 asking --

23 THE COURT: While he was at Marsh McLennan?

24 In other words, while he was at Marsh McLennan, do you
25 think he would be allowed to start saying, Oh, by the way, I'm

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1 going to be leaving, going somewhere else, it is not a problem,
2 and my current employer actually agrees with it, which is what
3 some of the e-mails apparently indicate?

4 I mean, I don't know. I guess what I'm trying to say
5 is --

6 Well, I'm sorry, go ahead. I cut you off.

7 MR. SIKON: Your Honor, to your point, I believe that
8 he was well within his rights under both California and New
9 York law, and I also think there is another issue as to whether
10 or not California law is ultimately going to be the applicable
11 law with respect to a number of these issues.

12 But I do think that he would be well within his rights
13 to say, I am resigning here and I am going to a new employer
14 and you are free to come with me if you so choose. He is not
15 allowed to use confidential or trade secret information under
16 California law to do so, but if it is publicly available
17 information, absolutely.

18 Now, your Honor, there is a couple other things I also
19 wanted to raise to your attention, which is notably absent from
20 any of the briefing here, is the fact that Mr. Ferguson is a
21 registered professional, and Marsh McLennan Agency is the
22 parent company of his employer, which is Marsh McLennan
23 Securities, LLC, which is a registered entity under FINRA.

24 So we think there is a very strong likelihood, your
25 Honor, we are probably going to file a motion to compel

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1 arbitration that these issues should all be before FINRA, as
2 opposed to in your court.

3 Other issues that I wanted to raise to your attention,
4 your Honor, are in particular the fact that, again, they've
5 been in communication with Mr. Ferguson's California counsel
6 since February of this year, so two and a half months ago. So
7 I don't really understand the rush to the courthouse now on two
8 days' notice to ask for an emergency temporary restraining
9 order when clearly they've been aware of these issues for two
10 and a half months. To me, that strikes me as bad faith, and
11 that they took their time to basically coddle together this
12 170-page brief, rush to the courthouse door to get it filed,
13 when they clearly have been on notice of these issues for as
14 long as two and a half months now.

15 Additionally, as I noted, I'm not licensed in
16 California, but I understand from some of my colleagues in
17 California that California has a very strong policy perspective
18 that when you have agreements like this that try to
19 basically -- you have an individual who is employed in
20 San Francisco, in California, you have supervisors who are in
21 California, and you have, as far as I can tell from my quick
22 read of the motion papers here, all the salient factual issues
23 are rising out of California.

24 My understanding is that California is going to take a
25 very different view of plaintiff trying to use a forum

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1 selection provision and choice of law provision to circumvent
2 and basically afford Mr. Ferguson less protections than what he
3 would be entitled to under California law with respect to these
4 issues.

5 That is another threshold issue, along with the others
6 that I've already mentioned, that I think is going to need to
7 be decided here before we can proceed with any TRO or any
8 expedited discovery.

9 THE COURT: Well, I mean, the issue before me --
10 because I think there is substantial proof that there was
11 solicitation going on before he even left. I don't know
12 whether what sort of fiduciary obligations he had at the time
13 that he was at his former employer, and while I think, yes,
14 there are issues about choice of law, right, there are two
15 issues, right?

16 If the venue provision, in other words, choosing
17 New York is correct, do you apply California law or does the
18 whole thing go to arbitration or does the whole thing -- again,
19 I don't -- in my mind, the least likely, is it something that
20 should be litigated in California.

21 But in any event, you're right, those are all issues
22 that need to be dealt with. However, my reading of the
23 correspondence and the letter from Mr. Ferguson's lawyer was
24 that she did not directly engage the issue, or at least it
25 seemed to me engage the issue of the agreements, instead,

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1 what she raised was the possibility of filing some form of
2 discrimination suit.

3 So while I think, yes, you're right, there has been a
4 time lag, it seemed like there was a little bit -- it could be
5 interpreted that -- well, not even interpreted -- it could be
6 interpreted as a little bit of delay to actually get to the
7 issues which the plaintiff was raising.

8 There may be counterclaims. There may be a separate
9 lawsuit related to that or somehow they are tied, and I don't
10 know if the claim is that it is retaliatory, but they didn't
11 engage on the specific issue of the confidential information,
12 at least it didn't seem to me at least in the exchange, at
13 least that initial letter that was written, that that was
14 addressed.

15 I agree there has been a lag, somewhat of a delay, but
16 are you saying that your client isn't willing at this stage to
17 meet and confer with the other side about what the parameters
18 will be going forward to maintain whether you go to arbitration
19 or whether you're going to be here and whatever law applies to
20 sort of maintain things where they are now. In other words, so
21 let's say I say, OK, fine, we'll wait for the TRO hearing at
22 some other point in time.

23 Is your client -- let me ask, is your client going to
24 then continue to contact -- I guess the allegations are there
25 were 20 some odd people -- it may be that in the end of the

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1 day, that the relevant rules of FINRA that he has some ability
2 to do that under specific guidelines that FINRA provides, but I
3 guess my question is, so during that interim period, is your
4 client willing to at least figure out what the parameters are
5 going to be going forward, and also in terms of my
6 understanding there were downloads and e-mails were sent from
7 his former employer's account -- I don't know what the e-mails
8 are -- but over to his new employer.

9 So I don't know specifically what those are, but when
10 you have things that are transferred like that soon before an
11 employee leaves, that raises question about those materials,
12 including whether or not, while he may have had his own contact
13 list, electronic Rolodex, I don't know exactly whether that is
14 necessarily his.

15 While you're right, there could be public information,
16 but somehow I think the e-mails, for example, that he was
17 sending from when he was still employed to these customers, I
18 would imagine what happened was he typed into his computer, it
19 populated because he had it in his contact list. Now, if that
20 contact list is not really his property, but Marsh McLennan's,
21 then I think there is an issue.

22 I guess the threshold issue I'm trying to deal with is
23 getting us from here until the parties could brief whether it
24 is the arbitration issue or the other issues that I'm presented
25 with.

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1 I understand you're saying this is not an emergency,
2 but OK, but is your client willing to basically not continue to
3 call people to have a discussion with regard to the stuff that
4 he not use the stuff that he sent to himself from his -- again,
5 without having gone through the process where people can
6 basically determine some of the stuff is fine, like he was
7 sending, you know, personal e-mail, whatever it was, and that
8 is really what I'm asking?

9 MR. SIKON: In short, your Honor, yes. Absolutely.
10 I've already spoken to him, and as I understand it, he has not
11 and he will not be talking to any Marsh McLennan Agency clients
12 going forward. While, of course, this is pending.

13 Having said that, your Honor, I did want to note that
14 if you look specifically at the language of the agreements at
15 issue, both of them that they attach to their briefing, it is
16 very specifically tailored to say, basically, that he will not
17 use any confidential information and trade secrets to solicit
18 those clients.

19 Our position is, based off of my brief conversation
20 with him, is that he hasn't. To your Honor's point about him
21 having potentially sent himself client contact information, as
22 I understand it from him, that is all publicly available
23 information related to these clients and their 401(k) plans.
24 There is even a form, as I understand it from him, a form 5500
25 that is required to be filed --

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1 THE COURT: I'm familiar with 5500s.

2 MR. SIKON: I wasn't. Apparently it has to be filed
3 with the Department of Labor, and it basically includes
4 information related to the contact information of these
5 particular clients.

6 As we all know, as a matter --

7 THE COURT: But let me ask this. There is a
8 difference, though, I think, between something that you can --
9 where he has a memory of, like, this is my client, this is
10 mine, and then he separately goes and gets the information
11 publicly, as opposed to an aggregation that has either been
12 done by him or by the company. It not only includes 5500
13 information, but it includes other information about that
14 client, including information that -- again, this is really in
15 the weeds -- information that he was either provided when he
16 got the lead or information that he's developed over time with
17 regard to the client, idiosyncrasies, wife's name, mother's
18 name, you husband's name, kids, all of those things that I
19 don't know. But I imagine it may have been part of all this
20 material that got shipped over.

21 While I understand that -- I think there is an issue
22 about -- I'm not sure where the law comes out on this. In
23 other words, if you have something that is in your contact list
24 which is publicly available, does that mean that you can just
25 take the contact list if the company basically has some claim

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1 to that because they provided the leads or what have you. I
2 don't know.

3 I understand the issues. Let me ask this to cut to
4 the chase -- because I'll give the parties a few days to
5 basically come to an agreement as to what is going to be going
6 forward. You're not going to be conceding anything other than
7 saying during the time period that either this case is pending
8 or if the parties agree that it should go to arbitration, that
9 you're in arbitration, whatever it may be, to a document that
10 basically outlines the conduct of what both sides are going to
11 be doing.

12 You've said that he has no intention to contact any
13 of the Marsh clients or the people who were his clients and
14 however you want to phrase it. I think there is -- the other
15 side is that sort of the confidential, allegedly confidential
16 information. It may end up being that there is a determination
17 that some of that is not confidential under the agreements in
18 question, but it may end up that some of it is.

19 I guess what I would like the parties to do is, over
20 the next few days, or even if you're able to do it in the next
21 day or so, to come up with something -- I have a proposed
22 order -- but to come up with something along those lines,
23 whatever language you want to use, that would just maintain
24 going forward. If you can't reach an agreement, then I'll make
25 the ultimate decision.

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1 But what I would say is I'm operating under the
2 understanding that your client right now, even though there
3 isn't anything in place based upon what you've said, is that
4 he's not going to be picking up the phone today or tomorrow and
5 e-mailing and the like or any sort of communication with these
6 folks.

7 That's my proposal for the parties. It is better --
8 because I don't know all the intricacies of what may have been
9 confidential information as alleged to have been taken as well
10 as the number of potential clients that may be at issue.

11 Let me hear from you with regard to that proposal and
12 I'll ask plaintiff's counsel, also.

13 MR. SIKON: Yes, your Honor. That is perfectly
14 acceptable to us.

15 The only thing I would just like to know, your Honor,
16 to your point a few minutes ago about the client contacts, my
17 understanding is it was nothing more than contact information.
18 It was literally his Outlook contacts.

19 I think it is pretty clear under New York law that you
20 are entitled to recreate that from memory and from public
21 sources. So, again, we are, of course, going to work with
22 plaintiff here, and we are happy to see if we can reach a
23 resolution regarding a restriction that is in line with the
24 actual language of the agreement --

25 THE COURT: Yes.

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1 MR. SIKON: -- while we try to work out these issues.

2 Again, I just wanted to note that particular issue
3 with respect to that.

4 THE COURT: I get that. There may be, I recognize --
5 and I apologize, because I know you're just coming into this --
6 but as I said, it's been sort of percolating for a while, and I
7 think there was this strategic choice that counsel in
8 California made. And I think she said it herself, you know, in
9 her letter, I think something along the lines of, I guess Marsh
10 is taking a view that rather than being on the defense, they
11 are going to go on the offensive, and she raised all of the
12 issues. Strategically, that may have been the way to go. The
13 problem is, it didn't engage on the specific issues that Marsh
14 was concerned with.

15 Let me hear from plaintiff's counsel on this.

16 MR. WEBER: Your Honor, I respectfully agree with
17 counsel's interpretation of the law. The information on our
18 plaintiff's contact information is ours, is more than I think
19 that someone can remember.

20 As to the delays, you can see from the correspondence,
21 we did make a good faith effort since we found out about the
22 breaches to try to work out a resolution. We sent
23 correspondence. We got some back. We tried to do it before we
24 got here with respect to the delay.

25 What I would recommend to your Honor is that you sign

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1 a TRO for a few days. I agree with you, I think that gives us
2 an opportunity to sit down and try to work out, one, a
3 discovery schedule -- we would like to take plaintiff's
4 deposition as soon as possible -- and see if there is some
5 confines of an agreement that we can agree to.

6 But we are not confident that the plaintiff will abide
7 by its obligations based on what we've seen so far before
8 resignation and after. That is why we're hear to ask for some
9 court relief.

10 THE COURT: Look, this is what we're going to do.
11 There are going to be two parts to this. What it amounts to,
12 because I actually will have to, if you can also arrange to get
13 me a Word version of the order to show cause.

14 I would enter something for a short period of time to
15 allow the parties to negotiate their sort of own understanding
16 with regard to any expedited discovery. I'll hold that in
17 abeyance. I think that while I'm not saying that it isn't
18 appropriate, I don't know enough concerning whether or not
19 there is an arbitration issue or not. If there is not, the
20 parties should talk about that initially, because if there --
21 but to be clear, with regard to whether -- so I haven't decided
22 that yet.

23 So what I would like to hear, in the same timeframe
24 that the parties attempt to negotiate something in connection
25 with the restrictions going forward, I would like to get the

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1 parties' at least initial view about this whole -- if there is
2 an issue related to this, whether there is arbitration or
3 litigation.

4 MR. WEBER: We don't believe it is an issue at all,
5 your Honor.

6 THE COURT: I understand. I mean, I understand that
7 there is going to be -- again, it is not something I had
8 thought about until it was raised. It may not be an issue. It
9 may be that after you meet and confer, that you agree on that.
10 It is just that I don't want to start the ball rolling on
11 expedited discovery until I get a sense of what and whether or
12 not there is an issue there.

13 Again, I'm not precluding having expedited discovery.
14 I'm also not precluding the parties from trying to, in your
15 discussions of this -- look, I don't know where the pressure
16 points necessarily are -- to try to resolve

17 this. Look, the bottom line is, Marsh has certain
18 information they believe was taken. The defendant may dispute
19 that, but the defendant is at a new place of employment, and I
20 can't imagine this is the best way to start wherever he is
21 starting, in particular. And as I was reading through the
22 papers, I was wondering, you know, whether the new place of
23 employment, where they were in the picture, and whether at some
24 point are they going to be a necessary party or what is going
25 on. I just didn't know.

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1 I guess what I'm saying is, yes, talk about all the
2 issues in the case that you believe are relevant. I understand
3 that there is going to be a disagreement about arbitration. I
4 may need to make a decision on that. I will do that.

5 But if I could get a Word version of this document,
6 we'll take -- but you should know that with the exception of
7 the discovery issues, and again, that in sort of broad strokes,
8 that I'm orally imposing a restraining order with regard to
9 contacting Mr. Ferguson's Marsh's clients and from utilizing
10 the information that was transferred from either by e-mail,
11 downloads, or otherwise from Marsh.

12 Recognizing, and I'm not weighing in on whether or not
13 that material ultimately will be found to be confidential. So
14 until I can enter the actual written order, you should let your
15 client know that I orally imposed those restrictions.

16 Then we'll get the written order either later today --
17 because I have a criminal trial that I'm doing -- either later
18 today it will hit the docket or the latest at some point
19 tomorrow, the written order.

20 MR. WEBER: We'll have that Word document to you this
21 morning.

22 THE COURT: Fantastic.

23 MR. SIKON: Your Honor, if I may, two things with
24 respect to the TRO.

25 So I mentioned this a little while ago. One, one of

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1 the concerns that I have is that the proposed order that they
2 had submitted, again, it does not actually reflect the language
3 within the agreement in terms of the restriction. Again, the
4 restriction with respect to Mr. Ferguson was that he would not
5 be allowed to use confidential information or trade secrets to
6 solicit MMA clients. There was not actually just a straight
7 bar on solicitation of MMA clients.

8 I just want to be clear, your Honor, that it is our
9 position that he is, under this agreement, allowed to solicit
10 MMA clients. Just to the extent you're considering an order
11 with respect to that, I just wanted to flag that for your
12 attention.

13 The other thing, your Honor, if I make one more point?

14 THE COURT: Go ahead.

15 MR. SIKON: I believe their proposed order had
16 restrictions on soliciting MMA employees, which I agree there
17 is a restriction in here on him soliciting MMA employees, but
18 so far as I'm aware from my quick review of the papers, there
19 is no allegation that he has actually done that.

20 So, again, I would just ask your Honor, considering
21 the actual written order, that there be some consideration of
22 those two issues.

23 THE COURT: Sure. Look, with regard to the language,
24 let me put it this way, obviously the restrictions would be
25 based upon the contract of limitations as the relevant law

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1 applies to them.

2 However, assuming I take the language out of the
3 contract and utilize it, Mr. Ferguson might be playing with
4 fire to try, in other words, skate in between that, if you
5 understand what I'm saying.

6 In the sense that I understand that's your position,
7 and it may well prevail, but it may not. Therefore, if he
8 starts doing this -- and that's why, quite frankly -- and while
9 it may be just staking out your legal position and it is not
10 that the client intends to sort of try and continue to do --
11 because here is an example of a problem with the way that may
12 happen.

13 There were a lot of things shifted over. At the same
14 time, he still has the information. And yes, he may have some
15 memory of something, he goes and Googles it. There is going to
16 be a question of where that information came from. Because now
17 that -- it would be one thing if he didn't take anything and he
18 sat down day one at his new employer and racked his brain about
19 all the people that he had contact with and did the public
20 searches.

21 Again, I have not, you know, delved deeply into the
22 law. I think right now, because he has taken those things,
23 there would be a question about whether or not and where he
24 actually got -- putting aside, just saying assuming that -- I
25 understand there is an argument that you would make that the

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1 information in his contact list is not confidential within the
2 meaning of the agreement.

3 So I'll consider what you said as I draft the language
4 of it, but I'll also consider whether or not, in order to
5 maintain the status quo, I understand ultimately it may be, it
6 may end up exactly where you are, but there sounds to be a fair
7 amount of dispute about some of the issues.

8 I understand what you're saying. I'll take a look at
9 that as I draft the language.

10 All right. I'm going to put a time period in the
11 actual order. How much time do you think you need --
12 obviously, I know counsel is getting up to speed -- but I
13 assume that Ms. Dupri will be involved in those discussions.

14 How much time do you think you need to work that out?
15 I was thinking at some point next week.

16 MR. WEBER: I was going to say by end of the day
17 Tuesday, if that works for you.

18 MR. SIKON: That does, your Honor.

19 THE COURT: All right. End of the day Tuesday. I
20 think that makes sense.

21 Look, if you need some additional time, just let me
22 know. But I'm thinking, you know, again, barring anything
23 unforeseen, the outside, next week is what I was thinking.
24 Tuesday made sense to me. We'll make it Tuesday. With the
25 understanding that I'm orally imposing the temporary

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1 restraining order. I haven't specifically come up with the
2 language, but I'm orally imposing that along the lines I
3 mentioned earlier.

4 All right. Is there anything else that we need to
5 deal with today?

6 MR. WEBER: I don't believe so, your Honor.

7 MR. SIKON: Nothing, your Honor.

8 THE COURT: Thank you very much for coming in. I'm
9 sorry it had to be so quick.

10 MR. WEBER: Thank you, your Honor. I appreciate it.

11 THE COURT: Yes.

12 (Adjourned)